

SDMS US EPA REGION V -1

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ADMINISTRATIVE RECORD

- GENERAL POINTS

Congress designed the administrative record for selection of response action as having 2 purposes:

1. Judicial review - Limited to the record; Create a contemporaneous and adequate explanation of the basis for a response selection
Standard of review - arbitrary and capricious
2. Public participation - Open public docket so that public, including PRPs, can participate in selection of remedy.

Agency advantage: If we have adequate records, will cut substantially the time spent on litigating selection of remedy. Will also ensure that EPA follows proper procedures and makes a rational decision.

Choice - have adequate records, go to court on whether our decision was arbitrary and capricious, based on the record; or have inadequate records, court will decide what an adequate remedy is de novo - introduce all evidence, depose everyone, respond to limitless document production requests

- Regions must begin compiling records now for all sites where we have begun a remedial investigation - public docket both at Regional Office and at or near the site. Should not release an RI/FS for public comment or sign a ROD without having an administrative record available for public review.

- When begin compiling record?

Removal actions - when initial action memorandum is signed; Exception for those removals where it is not feasible to compile record then - i.e., classic emergency removal actions

Remedial actions - when remedial investigation phase begins (when work plan available). Reason for compiling earlier than statute mandates: so PRPs cannot claim inadequate notice

- When does record close?

Open for debate

- Where?

Record must be available to public in two places:

1. Regional office - must be a public docket
2. At or near the facility at issue - interpreted as the one of the community relations information repositories

Exception for removal actions where it is not feasible to put record near site (e.g., highway spill)

Still debating whether for State-lead sites, States may compile and maintain the record, with a copy at Regional Office. For those sites, there may be three copies of the record.

- Who?

Federal-lead sites: Proposing that information would be funneled to a docket clerk. RPM, OSC, enforcement, ORC, State, ATSDR, would all give information to docket clerk in timely manner, i.e., as information is generated

State-lead sites: Unclear still. Proposing that States compile and maintain record, but at some point transmit a copy for EPA to maintain as well. SMOA and site-specific cooperative agreement should address the States requirements and procedures equivalent to the NCP.

Federal facilities: OMB executive order gives the federal agency responsible for the facility the authority to compile and maintain the record for those facilities.

- What information?

General: Need a record of why we select a response action for every site at which we begin a remedial investigation or sign an Action Memorandum for removal action

Any information upon which the agency bases its decision on selection of response action - both in support of and in opposition to the decision.

- Privileged information - CBI, enforcement sensitive, attorney-client information, attorney-work product documents, other FOIA exemptions, do not go in record. However, if feasible, information in those documents relevant to the decision on selection of response action must be summarized and placed in the record. If not feasible, need a confidential portion of the record.

- Predecisional information - Since predecisional information is not ordinarily the basis for our decision, drafts, internal memoranda do not go in the record unless released to the public (including PRPs), or if they do contain relevant information which the Agency uses to base its decision which is not in the final document does not contain.

Documents for Removals (minimum requirements)

- Sampling data
- removal preliminary assessment
- Site evaluation report

Draft 11/20/81

ADMINISTRATIVE RECORD ISSUES

Issues we believe are resolved:

1. NPL Listing docket information: Index of docket sufficient instead of copying an existing docket, unless information is of central relevance to the response decision - then include actual documents. Legal risk in doing this, balanced with practical considerations. close & keep
2. Comment period for removals: General agreement that administrative record regulations should only require that any comments received on removals be put in the record; require that ERD develop policy on comments for removal actions, which will be incorporated into the NCP. PA 2. xpm?
3. When do we compile a record for removal actions: When the Action memorandum is signed.
4. Comment periods on RI/FS work plan stages: Regs will require informal public involvement at early stages; Inclusion in record of work plans and comments received at all stages, and any responses to those comments. id
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5. Location of Record: Complete record at Regional office, copy "at or near the facility at issue" - same location as one of the information repositories, except for spills. Z
6. Guidance documents, technical sources: Will not be included in site-specific dockets unless of central relevance to decision made. Docket clerk will keep library of documents cited in record, readily available to public.
7. Ex parte communications: Meetings with PRPS, public in general should be documented in writing if relevant information to the selection of our response action is generated during those meetings.
8. Confidential information: Not part of the record; wherever feasible, all relevant technical information from enforcement sensitive documents, CBI, must be redacted and put in record. If not feasible, need confidential section of the docket. -
9. Draft documents: Only part of the record if contain information upon which decision is based, which was not included in the final document, or if released to the public.
10. Record for "no-action" decisions: Removal actions - no requirement for records of "no action"; Remedial actions: must keep record for all sites at which an RI begins.
11. Federal Facilities: Federal Agency responsible for the federal facility must compile the record in accordance with NCP requirements. Decision made that no EPA oversight is necessary over what the Federal Agency will put in the record.

12. Endangerment assessment: Include in the record. Agency will argue it is subject to the arbitrary and capricious standard
13. New documentation required for the record:
 - Preferred alternative with FS
 - Discussion of significant changes from draft FS to ROD and reasons for change
 - Explanation of differences if re-open ROD
 - Memoranda documenting relevant technical information generated during negotiations
 - Memoranda explaining differences between workplan and AO or CD; or draft RI/FS and CD
 - Comments on removal actions, and responses thereto
 - Beefed-up action memo for removals
14. Legal sources: Copies of NCP, RCRA, or other legal sources readily available to the public need not be included in site-specific docket. TBCs will be treated like guidance
15. Grandfather clause: Regs will not be legally binding on actions for which a draft RI/FS has not gone out for public comment at the time the regulations are final. However, will strongly suggest that Regions follow procedures for all sites when proposed regulations are published.
16. Updating index: Whenever significant new information is added to the record (as opposed to monthly, quarterly, etc.)
17. One docket per site: Discretionary whether to keep one docket per site, or one docket per operable unit.
18. Information not included in record: Discretionary whether to include scope of work, actual copies of ARARs, CRP, fact sheets, press releases, information on cost documentation, model input information (outstanding issue still whether QA/QC'd actual test results must be in record)
19. Information which was controversial, but now in record: Chain of custody forms, work plans, [OSC log, OSC report - if record for removal actions remains open through OSC report], index to NPL listing docket, final model results.
20. EDDs: No more EDDs - all remedial action decision documents in same ROD format.
21. Administrative Orders: Regulations and guidance apply to administrative orders.

- Any other factual data relating to reasons why we selected a particular removal action at the site
- Index to NPL listing docket [if applicable]
- Chain of custody forms
- Engineering evaluations
- Cost analysis documents
- Final data output of technical models used
- Action memoranda - initial action memo and all amendments, including ceiling increase action memoranda, and action memoranda on technical changes
- Final ATSDR health assessment
- Relevant factual/policy information from OSC log (can redact from log)
- Memoranda on major policy and legal interpretations - site specific (e.g., provision for cost sharing, division of responsibility between Federal and/or State agencies, off-site disposal availability, compliance with other environmental statutes, special coordination needs e.g., dioxin)
- Relevant information from telephone logs
- New technical information presented by PRPs during negotiations
- Relevant portions of guidance documents, technical sources cited in documents included in the record
- Public comments, if any
- Responses to substantive comments
- Transcript of any public meetings
- Copies of any public notices
- Documentation of meetings during which public and PRPs present information upon which lead agency bases its decision
- Final enforcement documents
- OSC final report

Documents for Remedial Actions

- Preliminary assessment report
- Remedial site evaluation report
- Index of NPL listing documents
- Any relevant removal documents (if removal action done at site)
- - QA/QC'd data summary sheets
- Chain of custody forms
- ✓ - QAPP
- Initial work plan and any amendments thereto
- RI report (final deliverable released for public comment)
- Any other factual data relating to reasons for selecting the remedial action at the site
- Memoranda on policy and legal interpretations - site specific e.g., off-site disposal availability
- Relevant information from telephone logs
- Final data output of technical models
- Any new factual/technical information presented by PRPs during negotiations
- Proposed remedial action plan, brief analysis of plan (preferred plan) ~~alternative)~~

Reference Compendium of ^{guidance} ~~reference~~ materials

- FS report
- Endangerment assessment
- ATSDR health assessment
- Any public notices, including notices of availability of information, notice to States
- Public comments (late comments section)
- Responses to substantive comments
- Transcript of public meetings
- Information submitted during any meetings with public and PRPs upon which the Agency bases its decision must also be included in the record
- ROD, including statement of basis and purpose of selected action summary of alternatives considered, an explanation of why Agency chose the preferred alternative, and explanation of any
- RCRA corrective action docket, if applicable
- Significant differences between PRAP and ROD
- Final enforcement documents
- Information received after ROD signed relevant to selection of response action (only if changes ROD - issue)

Discretionary information

- Information which has been summarized - actual sampling results
- Underlying information - Quality control reports, such as chromatograms, mass spectra, model documentation and computer codes
- Documents not relevant to selection of the response action, but relevant to the site: community relations plan, fact sheets, press releases, information on design, cost documentation, scope of work

State Involvement

Record should reflect at least the following points of State involvement:

- Identification of State ARARs - assume iterative process, include all communications in record
- Comments from State on final workplan (not all comments from State on all draft workplans)
- Comments on initial screening of alternatives
- Comments from State on RI report
- Comments from State on draft FS
- Concurrence/nonconcurrence on preferred alternative
- Concurrence/nonconcurrence on ROD
- Comments on §121(d)(4) finding of decision to select a remedial action that does not attain a level of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria or limitation
- any notice to state of availability of information
- cooperative agreement with State

Other information should be treated as predecisional inter-agency deliberative information unless the information is released to the public, or it contains relevant information not included elsewhere in the record.

ATSDR

Include only final health assessment. Other comments not on the record unless EPA/State solicit from ATSDR, or EPA releases to the public, including PRPs, comments used for basis of selection of response action which are not included elsewhere.

Settlement Negotiations

- Split negotiations into legal and technical discussions. Technical discussions on the remedy with PRPs are on the record
- Record open during moratorium period - use the record as a vehicle for public participation. Must therefore document technical discussions and meetings with PRPs as soon as possible, put information in the record so public is informed of information generated during negotiations

Comments on Record

Comments can come in at any time when the record is open. EPA should respond to all substantive comments, not just those which come in during the formal public comment period.

Reopening record

On hold

Federal Facilities

Federal Agencies may compile the administrative record for federal facilities under their jurisdiction. The inter-agency agreement must address the issue of procedures for compilation and maintenance of the record.

RCRA Facilities

If a RCRA facility doing corrective action becomes a CERCLA site, the corrective action documents must be placed in the information repository as soon as possible after the site becomes a CERCLA site.

Contractor information

On hold

FOIA Requests

On hold

DRAFT NOTICE LETTER GUIDANCE: MAJOR ISSUES AND RECOMMENDED CHANGES

I. ISSUE #1: TIMING OF RD/RA SPECIAL NOTICE

Q: At what point in process should RD/RA notice letter be issued?

- o Draft Guidance: Issue RD/RA special notice once draft FS completed and "preferred alternative" identified (i.e. before ROD signed).

- Would allow PRPs opportunity to discuss selection of remedy during negotiations for RD/RA. Would hopefully facilitate settlements.

- o Comments: Most commentors STRONGLY DISAGREED with guidance. Suggest issue special notice only once ROD signed.

- PRPs should NOT be involved in selection of remedy. Extent of PRP involvement should be comment during public comment period.

- Purpose of RD/RA moratorium to negotiate implementation NOT selection of remedy.

- PRPs need to know precisely what remedy they are negotiating on (i.e. selected remedy).

- Unrealistic to expect settlement in 120 days, especially if try to negotiate selection AND implementation of remedy.

- o Recommendation: Support draft guidance.

- Important to maintain flexibility in negotiations, including selection of remedy. Goal to foster settlements.

- PRPs would have knowledge of "preferred remedy."

- ROD could be signed during or after moratorium/negotiations.

II. ISSUE #2: TIMING AND DURATION OF PUBLIC COMMENT PERIOD

Q: What should be the timing and duration of the public comment period? How would the public comment period relate to the moratorium?

- o Draft Guidance: Issuance of special notice triggers moratorium and public comment period simultaneously. Public comment period would extend from 60 to 120 days to coincide with moratorium.

- Ensures public has opportunity to comment during negotiations if selection of remedy discussed.

- o Comments: Most commenters STRONGLY DISAGREED with extension of public comment period to coincide with moratorium.

- RD/RA negotiations should not cover selection of remedy, so no need for extension of public comment period.

- If change timing of notice until ROD signed, no need for public comment during RD/RA negotiations since remedy already selected.

- Public has opportunity to comment on draft consent decree.

- EPA may not receive public comments until end of moratorium. Too late in process to incorporate comments; would slow down process for implementing remedy.

- Would not necessarily lead to public involvement since provides no mechanism for public participation.

- o Recommendation: Support commenters approach. Change guidance to reflect current public comment period of 30 days. Public comment period could be extended if appropriate (e.g. if RD/RA negotiations covered selection of remedy).

- Mechanisms for public involvement would be:

- o comment on RI/FS during formal public comment period; and

- o comment on administrative record.

- o *comment on Consent Decree*

- ROD could be signed during moratorium/negotiations. Trigger is close of public comment period and preparation of responsiveness summary not moratorium/negotiations.

ISSUE 3: When does record close for removal actions?

OPTIONS:

1. When Action memorandum signed

Advantages:

- Action memorandum is the decision document; Any information generated later is post-hoc explanation of decision
- Limiting public involvement during the actual removal will not slow process down

Disadvantages:

- is to come →
- Many decisions on removal action made in field after Action memorandum signed, therefore record may be incomplete
 - Action memoranda often very general - insufficient information to support a decision until later - needs to be beefed up.

2. When OSC Report is filed

Advantages:

- we his (st) →
- Differential standard of review throughout implementation phase
 - More information supporting the decision (albeit after the fact)
 - More public involvement, which one could argue is Congress' intent on removal actions other than emergencies

Disadvantages:

- With record open longer, more public involvement on removal action which could slow process down
- Easier for PRPs to pad the record
- OSCs generally object to this as quite burdensome

3. Require a new document to be generated for removal actions which would close the record.

Advantage:

- Clean way to have record close when mitigative measures described rather than before or after the decision is made

Disadvantage:

- ERD and OSCs strongly object to more paperwork

ISSUE 4: Moratorium/Administrative record connection: How is public kept informed of negotiations with PRPs during moratorium?

OPTIONS:

1. Keep public comment period open for length of moratorium

Advantages:

- NO*
- Public cannot claim that Agency is negotiating behind closed doors
 - Public on formal notice that can comment for length of the moratorium

Disadvantages:

- Regions claim this is burdensome
- Could delay the process, since cannot sign the ROD while public comment period is open; need time to compile responsiveness summary once public comment period closes

2. Use administrative record as vehicle for public information on negotiations with PRPs

Advantages:

- The record is there and open at least through ROD signature for the purpose of public involvement - may not be a need for a formal public comment period
- Will not delay the process - can sign the ROD at any time after formal 30-day public comment period ends

Disadvantages:

- Will only work if technical discussions with PRPs on remedy are documented and available as soon as generated
- No formal notice that information is available

*Why negotiate in public,
Big appearance issue*

ISSUE 5: What is EPA's duty to respond to comments which come in while record is open?

OPTIONS:

1. Respond to all comments which come in; separate out comments which come in pre-formal public comment period and late comments.

Advantages:

- Ensures a more adequate record
- Requires Agency to consider comments in timely manner
- Legal sufficiency

Disadvantages:

- Quite burdensome for the Regions

2. Respond to comments which come in during formal public comment period; Regional discretion as to whether/when to respond to other comments (although must "consider" all substantive comments.

Advantages:

- Less burdensome for the Regions

Disadvantages:

- Legal risk of not responding to comments

ISSUE 6: Should States compile/maintain record for State-lead sites? (Strong DOJ interest on this issue)

OPTIONS:

1. States compile and maintain

Advantages:

- If delegating responsibility for a site to the State, should delegate responsibility for the record as well
- States will know better what documents have been generated

Disadvantages:

- EPA ultimately responsible for selection of response action, therefore stake in having adequate record
- Regions want to keep this responsibility - mistrust of States compiling adequate records for us
- Hard for public to know where record is - State or Regional office

2. EPA compiles and maintains record

Advantages:

- Records all in one place; easier for public

Disadvantages:

- States in better position to know what documents have been generated
- Burdensome for States to be constantly sending information to EPA

3. State compiles and maintains, EPA also maintains a copy at some point in the process (e.g., when RI/FS available for public review)

Advantages:

- Seems to be a good compromise - gets rid of most disadvantages

Disadvantages:

- Would entail 3 copies of record - Regional office, State office, copy at or near the site)
- Regions still seem to want to compile record

PA
seeds to
assume
responsibility
+ E

- before
3.2.5 = signed

ISSUE 7: Are interactions with State and ATSDR on/off record?

OPTIONS:

1. All information relating to selection of response action on
- record

Advantages:

- No problem with State/ATSDR releasing information
EPA claims is inter-agency deliberative information

Disadvantages:

- Voluminous information
- Could inhibit exchanges between State/ATSDR and EPA
- Release damaging information, e.g. ATSDR critiques
EPA sampling plans negatively

2. Select stages in process where there will be a formal exchange
between Agencies; All other exchanges considered predecisional
or interagency deliberative process

Advantages:

- Cut down on volume of documents in record
- Formalize process with State/ATSDR
- Won't inhibit other exchanges with State/ ATSDR

Disadvantages:

- Must get State/ATSDR to agree to do this
- If information released by State/ATSDR, may be argued
that our record is incomplete
- Public perception that EPA/State deliberately keeping
information out of record

*like
is but
out of us
will be
Successful.*

Additional Information

1. Regions are concerned about resources - need to focus OERR on this issue
2. Should tell Regions in training (June) that should not public notice an FS or sign a ROD if do not have a record compiled and available for public review (both at Regional Office and at or near the site)
3. New and significant information after the record closes - when do we:
 1. Re-open record and just provide an explanation of differences
 2. Re-open record and ROD
 3. Re-open record, ROD, and take public comment

We are working with the ROD guidance workgroup on this issue

4. When and by whom is the record certified complete?

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cision
1. Certified complete when record closes
 2. Closed but not certified until have judicial action
 3. Three levels of certification - docket clerk, decision-maker when the ROD is signed, and when file a complaint

The resolution of this issue depends on resolution of when the record closes

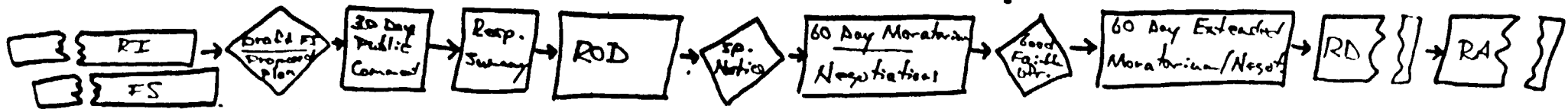
5. Special notice to PRPs for removal actions - should the regulations include a paragraph stating that the Agency has decided not to apply the special notice provisions of §122 to removal actions in the context of notice to PRPs and the administrative record for removal actions? *yes*

6. Contractor information may still be a problem

7. FOIA requests and privileged information - do we follow standard process of requesting that OGC concur before we can claim deliberative process privilege for administrative records? Can we have an alternative system which pre-approves deliberative process for certain classes of information, e.g. drafts of work plans not released, drafts of FS not released.

8. Recent decisions ruling on judicial review/administrative record - problems with record review for §7003 claims, §106 injunctive relief.

Option 2: Best Case Scenario



Option 2: Worst Case Scenario

